

NO. 21088

In the

**United States Court of Appeals
For the Ninth Circuit**

ROBERT LEWIS BANZER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the
District of Oregon

HONORABLE JOHN F. KILKENNY, *Judge*

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CAUSE OF ACTION

I.

This is a criminal action based upon an Indictment founded by the Grand Jury under Section 18 U.S.C.A. 2314, charging the Appellant with the crime of "Unlawful Transportation of Counterfeit Securities Interstate" in six counts. Appellant entered his plea to each count of Not Guilty and the cause came on regularly for trial.

At the commencement of the trial the United States Attorney moved the Court for an Order to amend the Indictment in Count I changing the date of the alleged forged document from November 24, 1964, to *December*

4, 1964, and changing the amount of the check from \$98.27 to \$98.23 and in Count III changing the amount of the check from \$98.48 to \$98.46 and in Count V changing the amount of the check from \$98.40 to \$98.48. The court over objections of the Appellant allowed the Motion and the Indictment was amended to reflect the alterations above requested. The Appellant declined to offer any testimony at the conclusion of Appellee's case. The cause was submitted to the Jury resulting in a Verdict of Guilty to all six counts. The Appellant was sentenced pursuant to said verdict, from which sentence this appeal is taken.

PROPOSITION OF LAW

I.

The lower Court erred in permitting Appellee's Motion to Amend said Indictment (Transcript of Testimony Page 1) (United States Constitution Amendment V)

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

18 U.S.C.A. Sec. 1951

U.S. v. Fawcett, 115 Fed (2d) 764

Steroni v. U. S., 361 U.S. 212, 80 S. Ct. 270, 4 L Ed. (2d) 252, 1959

Ex Parte Bain, 121 U.S. 1, 7 S. Ct. 781, 30 L Ed. 849

Stewart v. U. S., 9 Cir. 12 Fed. (2d) 524

Dodge v. U. S., 2 Cir. 258 Fed. 300

Where a crime charged is a felony, the law clearly requires prosecution by Indictment. After an Indictment has been returned its charge may not be broadened through amendment except by the Grand Jury itself. The amendment permitted by the Court broadened and altered the Indictment of the Grand Jury so that it was no longer their Indictment, but was an Information of the United States Attorney. Appellant did not waive indictment by the Grand Jury nor did he agree to proceed on an Information presented by the United States Attorney.

PROPOSITION OF LAW

II.

Error of the Court in overruling Appellant's objections to evidence. Primary evidence is the best evidence. Secondary evidence is admissible only when primary evidence is not available, and under a proper showing. Appellee entered into evidence over the objection of Appellant Secondary evidence, (Appellee's Exhibit 1) consisting of a check similar in some respects to one under discussion which was not a carbon copy of the check in question and no foundation was laid which

permitted the exhibit to be introduced into evidence (Transcript of Testimony pages 5 and 6). The "American Rule" is well established and recognized in virtually all Courts and jurisdictions and is as follows: "Secondary Evidence in order to be admissible must be the best legal evidence obtainable." Diligence must be shown and exercised to obtain the best evidence.

Wigmore on Evidence, 3rd Edition 1268

Am. Jur. Evidence, Sec. 403, 404

Courette v. Williams, 20 U.S. 226, 22 L Ed. 254

Popolia v. U. S., 243 Fed (2d) 437

Monroe v. Bresee, 239 Fed 727

PROPOSITION OF LAW

III.

Error of the Court in denying Appellant's Motion for Acquittal (Transcript of Testimony pages 106-107)

Appellant duly moved the Court for an acquittal at the close of Appellee's case, based upon the record which was denied by the Court.

PROPOSITION OF LAW

IV.

Error of the Court in denying Appellant's Motion to Dismiss (Transcript of Testimony page 119)

Upon denial of Appellant's Motion for Acquittal the Appellant rested his case and moved the Court to dismiss the action, which was also denied.

SUMMARY

Appellant takes the position that all proceedings by the Court after allowing the amendment to the Indictment became a nullity and the Court should have acquitted the Appellant and/or dismissed the action, or at least should have re-referred the matter to the Grand Jury for further consideration. The Constitutional rights of everyone must be preserved and enforced at all times and particularly as it relates to criminal matters. It is a matter not to be taken lightly and is incumbent upon the Courts to follow to the letter of the law. If the Courts and prosecuting officials are permitted to amend Indictments at will, soon the Constitution would be of no further force or effect.

Respectfully submitted,

STANLEY J. MITCHELL

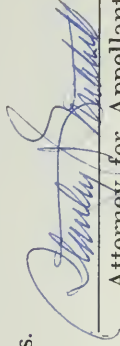
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Certificate of Attorney

I certify that, in connection with the preparation of this brief, I have examined rules 18 and 19 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Attorney for Appellant

